NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
JUN 25 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. AUGUSTINE RUBEN VASQUEZ III, Appellant.	2 CA-CR 2009-0056 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800151

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Malanga Law Office
By Rafael Malanga
Bisbee
Attorney for Appellant

K E L L Y, Judge.

¶1 Appellant Augustine Vasquez III appeals from his convictions for second-degree murder and possessing a deadly weapon as a prohibited possessor. He maintains the trial court abused its discretion in admitting certain photographs in evidence, in

denying his motion for mistrial based on prosecutorial misconduct, and in imposing an aggravated sentence. Finding no error, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdict. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In February 2008, Vasquez and a female friend were drinking with the victim, Hugo L. After Vasquez and Hugo began to argue, the female left. Police officers who arrived later at the scene found Hugo had been stabbed to death.

¶3 Vasquez was arrested while in possession of a knife with the victim's blood on it and was charged with first-degree murder and possession of a deadly weapon by a prohibited possessor. A jury acquitted him of first-degree murder but found him guilty of the lesser-included offense of second-degree murder and the prohibited-possession charge. The trial court sentenced him to a partially aggravated prison term of twenty years for the murder conviction and to a concurrent, presumptive, ten-year term for prohibited possession of the knife. This appeal followed.

Discussion

Photographs

¶4 Vasquez first contends the trial court abused its discretion in admitting "gruesome photographs" of the victim's body. We review a trial court's decision to admit photographs for an abuse of discretion. *State v. Hampton*, 213 Ariz. 167, ¶ 17, 140 P.3d 950, 956 (2006). "The analysis is based on three factors: the photograph[s']

relevance, [their] tendency to inflame the jury, and [their] probative value compared to [their] potential to cause unfair prejudice." *Id.*

¶5 On the second day of trial, at a conference in chambers, Vasquez objected to several of the state's proposed exhibits, including several photographs of the victim. He maintained the photographs should be excluded because they were "unduly gruesome and irrelevant" and "there[] [was] no relevance to the appearance of the wound."

¶6 The state countered that one of the photographs, taken at the scene, "show[ed] how [the victim] was found" and "the condition of the body." The state also maintained that autopsy photographs showing the victim's wounds were not excessively gruesome because the victim had been cleaned and were relevant "to show how the [autopsy] doctor saw th[e] victim," to illustrate some of his findings, and to help him tell jurors "which wound and combination of wounds resulted in th[e] [victim's] death."

¶7 The trial court admitted some of the photographs, finding the depiction of the victim at the crime scene was relevant as there was "at least some value in the jury's seeing the position of the victim as it appeared to the officers at the time." It also determined several of the autopsy photographs were not overly gruesome and were relevant to show the victim's wounds and their relation to each other.

¶8 Vasquez contends on appeal that the photographs were unduly gruesome and that, although the state cited other reasons for offering them below, they were "arguably . . . introduce[d] . . . for the sole purpose of inflaming the jury." But, as Vasquez himself acknowledges, "[p]hotographs of the deceased are relevant in a murder

case 'because the fact and cause of death are always relevant in a murder prosecution.'" *Id.* ¶ 18, *quoting State v. Spreitz*, 190 Ariz. 129, 142, 945 P.2d 1260, 1273 (1997). Likewise, photographs of a victim's body may be used for other purposes, including "to prove the corpus delicti, to identify the victim, to show the nature and location of the fatal injury, . . . to illustrate or explain testimony, and to corroborate the state's theory of how and why the homicide was committed." *State v. Morris*, 215 Ariz. 324, ¶ 70, 160 P.3d 203, 218 (2007), *quoting State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983).

¶9 "[P]hotographs must not be introduced 'for the sole purpose of inflaming the jury.'" *Hampton*, 213 Ariz. 167, ¶ 19, 140 P.3d at 956, *quoting State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982). They may be admitted, however, if they serve a proper purpose and their relevance is not outweighed by prejudice. *See Morris*, 215 Ariz. 324, ¶ 70, 160 P.3d at 218; *see also* Ariz. R. Evid. 403. And, such photographs may be admitted even when the defendant does not contest certain elements of the offense. *Hampton*, 213 Ariz. 167, ¶ 19, 140 P.3d at 956. "Because '[t]here is nothing sanitary about murder,' nothing in the rules of evidence 'requires a trial judge to make it so.'" *Id., quoting State v. Rienhardt*, 190 Ariz. 579, 584, 951 P.2d 454, 459 (1997).

¶10 In this case, although Vasquez asserts broadly that the state sought to introduce the photographs solely to inflame the jury, the record does not support his assertion. As outlined above, the prosecutor argued for the admission of the photographs for reasons allowed under Arizona law. *See Morris*, 215 Ariz. 324, ¶ 70, 160 P.3d at 218.

The trial court considered the relevance of the photographs and weighed their gruesomeness and potential prejudicial effect against that relevance. On the record before us, we cannot say the trial court abused its discretion in so weighing or in admitting the photographs. *See id.* ¶ 71.

Prosecutorial misconduct

¶11 Vasquez next contends the trial court abused its discretion in denying his motion for mistrial based on prosecutorial misconduct. He maintains first that the prosecutor improperly vouched for a witness when he asked an investigating detective whether the witness's testimony was consistent with what she had told him in an earlier interview. He argues that, "[b]y eliciting [the officer's] testimony . . . as to the consistent statements of another State's witness[,] the prestige of the government was placed behind the evidence and, therefore, amounted to vouching." But Vasquez objected below on hearsay grounds and did not mention this question and answer in later arguing his motion for mistrial on the basis of prosecutorial misconduct. Nor did he argue the prosecutor had vouched for a witness.

¶12 Vasquez has therefore forfeited the issue of whether the question and its answer constituted vouching absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*,

216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

¶13 Vasquez also argues the prosecutor committed misconduct by "repeatedly elicit[ing] hearsay evidence." While questioning the detective, the prosecutor asked if Vasquez's aunt had told police that Vasquez "had taken steps or had assistance to change his appearance in some fashion." Vasquez objected to the question on the grounds that it called for hearsay and the court sustained the objection. After a brief bench conference, the prosecutor asked the detective:

> I think the last question I had for you had something to do with learning whether or not the defendant may have changed his appearance from the time earlier until he was found sometime at his aunt and uncle's house . . . . [D]id you learn that he may have made . . . [an] effort to change his appearance?

The detective answered affirmatively, but without further explanation, and Vasquez objected. The trial court sustained the objection and struck the detective's response.

¶14 After the detective had completed his testimony, Vasquez moved for a mistrial, arguing the prosecutor had on "several different occasions, attempted intentionally to elicit hearsay evidence from the witness." He maintained that, even though his objections had been sustained, "the damage ha[d] already been done by the way the question was asked." Because Vasquez moved for mistrial on this basis, we review his remaining claim that the trial court should have granted a mistrial for an abuse of discretion. *See State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006).

¶15 "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To prevail on a claim of prosecutorial misconduct, "[t]he defendant must show that the offending statements, in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d at 846, *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998).

¶16 Here, as described above, Vasquez alleges misconduct based on two questions by the prosecutor that sought to elicit hearsay evidence about the defendant's appearance. The trial court sustained Vasquez's objections to both questions and struck the witness's one brief answer. The court also instructed the jurors that "what the lawyers . . . say is not evidence," that when "the court sustained an objection to a lawyer's question [they] must disregard it and any answer given," and that "[a]ny testimony stricken from the court record must not be considered." We presume the jurors followed those instructions and disregarded the prosecutor's questions and the detective's answer. *See Short v. Riley*, 150 Ariz. 583, 587, 724 P.2d 1252, 1256 (App. 1986).

¶17 Additionally, on the next day of trial, another officer testified he had seen Vasquez a few days before the murder and, when he had gone to talk to him during the investigation, Vasquez's "appearance [had] changed." He testified that before the murder Vasquez had worn a "full goatee," which he no longer had by the time the officer talked to him afterward.[1] Thus, because the prosecutor's questions were not the only mention at trial of Vasquez's changed appearance, we cannot agree with Vasquez's assertion that "[t]he behavior of the prosecutor called to the jury's attention matters it should not have considered, i.e. that the defendant attempted to change his appearance," and that the question therefore infected the entire trial. Indeed, even assuming the prosecutor's questions were misconduct, because the jury had received other, properly admitted evidence about Vasquez's change in appearance and was instructed to disregard the questions and answer, we conclude there is no "reasonable likelihood" that the prosecutor's actions "could have affected the jury's verdict." *State v. Moody*, 208 Ariz. 424, ¶ 145, 94 P.3d 1119, 1154 (2004).

¶18 In sum, we see no prosecutorial misconduct that would constitute fundamental error or a denial of due process. Consequently, we reject the argument that the cumulative effect of the alleged misconduct so infected the proceedings that Vasquez was denied a fair trial. *See Hughes*, 193 Ariz. 72, ¶ 27, 969 P.2d at 1191; *see also State v. Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d 368, 403 (2006).

[1]Vasquez testified he had shaved the goatee before the night of the murder.

Sentencing

¶19 Finally, Vasquez argues the trial court fundamentally erred by imposing an aggravated sentence when the state did not allege prior convictions pursuant to A.R.S. § 13-701(D)(11),[2] even though Vasquez admitted the convictions. As Vasquez acknowledges, he did not "raise this issue below," and we therefore review solely for fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶20 Vasquez both stipulated and testified at trial that he had three prior felony convictions. During the sentencing phase, the trial court found the prior convictions to be an aggravating circumstance under § 13-701(D)(11).

¶21 Vasquez contends he "never received notice that his prior convictions would be used for aggravation in the event he was convicted of first degree murder." He argues that, because the State had not alleged the prior convictions as aggravating circumstances before trial, "the trial court was constrained not to consider them." Relying on *State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985), Vasquez contends his "constitutional right to know the range of sentence he was facing before trial was violated." But *Waggoner* dealt with the notice required for the state to seek an enhanced sentence, not an aggravated one. *See id.* And, in this case, Vasquez did have

[2]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see id.* § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

notice of the range of sentence he faced; the only question was where his sentence would fall within that range if any aggravating or mitigating circumstances were established. He cites no authority to support the proposition that he was entitled to pretrial notice relating to that question and we are aware of none. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

Disposition

¶22 Vasquez's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge